

Case Comment: Lubanga: New Direction in Reparations Liability from the ICC

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By: Pearl Eliadis

In the largest reparations case to date from the International Criminal Court (ICC), the Trial Chamber II handed down its decision in the *Lubanga* case in December 2017.[1] The decision, rendered by judges Marc Perrin de Brichambaut (Presiding), Olga Herrera Carbuccia, and Péter Kovác, had two main objectives, namely to implement the Appeal Chamber's earlier order, the Order for Reparations of 3 March 2015 (The "2015 Order"), and to set an amount for reparations.

The Trial Chamber II reiterated key principles from the 2015 Order, including the proportionality between liability and harm, as well as the convicted person's participation in the commission of the acts for which the person was convicted. Evidence from previous proceedings had not resulted in a definitive number of victims, but the Trust Fund for Victims (the "Fund") provided an estimate of 3,000 thousand potential victims for purposes of budget and planning.[2] Subsequently, 473 persons submitted their files in support of reparations. Of these, 425 persons were recognized on the balance of probabilities as being direct or indirect victims with a right to collective reparations.

Direct victims were held to have experienced material, physical and/or psychological damages. Indirect victims had to demonstrate, *inter alia*, a personal relationship or connection to the direct victim in addition to establishing harm.

The Trial Chamber II assessed liability in relation to 425 victims collectively at USD $3,400,000. Together with an additional liability of $6,600,000 for as-yet-unidentified victims (whose testimony may come to light at a later point in time or may be revealed through the process of implementing the reparations order), the total amount for collective reparations was set at $10,000,000.

Background

Thomas Lubanga Dyilo was the founder and previous president of the *Union des patriotes congolais* - and Commander-in-Chief of the *Forces patriotiques pour la libération du Congo* (FPLC). In 2012, he was convicted of war crimes that took place in the northeastern part of the Democratic Republic of Congo, crimes that included conscripting and enlisting children under the age of 15 and using them in hostilities during the period between September 2002 and August 2003. The crimes had taken place against the backdrop of widespread conflict and atrocities in the mineral-rich region of Ituri near Uganda.

Trial Chamber I of the ICC had sentenced Mr. Lubanga to 14 years in prison. On August 7 2012, Trial Chamber I made what would be the ICC's first order for reparations, but authorising only collective reparations.

On 1 December 2014, both the conviction and the 14?year prison sentence were confirmed on appeal.

In March 3 2015, the Appeals Chamber issued its 2015 Order, amending the Trial Chamber's order for reparations and instructing the Trust Fund for Victims to present a draft implementation plan for collective reparations to Trial Chamber II within six months. The 2015 Order recalled that reparations proceedings are distinct from judicial proceedings but are nonetheless connected to penal proceedings under art. 74 of the Rome Statute. They have two principal objectives, namely, to repair the harm caused by serious crimes and to ensure that those responsible for those crimes are accountable for their acts. On the latter point, the Chamber also recalled reparations are intrinsically linked to the individual's criminal responsibility as determined in a sentence.

Before the Trial Chamber II, the responsibility for identifying victims and setting compensation was in question as between the Trust Fund for Victims and the Trial Chamber II. One commentary on the case noted that:

[The] Trial Chamber II and the Trust Fund for Victims (TFV) clashed in their under-standings of their respective mandates: while the Chamber believed it needed to identify and "approve" victims entitled to reparations as a prerequisite to determining Lubanga's monetary liability, the TFV believed this was unnecessary, and something the TFV should do during implementation (the TFV had estimated there were 3,000 potentially eligible victims). Similarly, while the Trial Chamber believed that it needed to determine the extent of the harm caused to victims to establish Lubanga's liability, the TFV thought that the extent of the harm was already described adequately in the Judgment, Sentencing Decision, and decisions on victims participation.[3]

Finally, the Chamber appeared to accept the approximate figure of 3000 victims that had been offered by the Fund.

Lubanga is indigent and was unable to satisfy the reparations award that had been made against him. As in the earlier ICC reparations decision in the case of Germain Katanga,[4] (*Katanga* case, which is reported in the PKI Global Justice Journal (2017) 1 PKI Global Just J 14 (November 20), it fell to the Trust Fund for Victims to identify funds for the implementation of collective reparations. The Chamber invited the Fund's Board of Directors to raise additional funds and instructed the Fund to contact the Government of the Democratic Republic of the Congo (DRC) to explore a potential contribution of the Congolese government to the reparations process. In 2016, the Trust Fund for Victims filed proposals regarding the implementation of collective reparations and a report that "mapped" the victims.

Identifying victims

The files of 473 persons claiming reparations were submitted to the Trial Chamber II of which 425 were identified as direct or indirect victims. Their eligibility for reparations was assessed based on established criteria of sufficient evidence of causality (*i.e*., the link between the actions of Mr. Lubanga and the damages suffered by the victims) and the damages incurred.[5] After some uncertainty in the proceedings, it was finally agreed that the 425 individuals were only a sample of those persons who may be eligible for reparations rather than a final and definitive list of victims.

The defence objected to the weakness of the evidence regarding the identification of victims and of the damages suffered. The Chamber, however, reiterated the importance of flexibility in the types of documentation that can establish the identity of victims and permitted documents such as tax records, electoral cards and student cards for those who were unable to access official state documentation that officially proves the civil status of the person concerned. Indeed, the Chamber recalled that in cases where even these types of unofficial documents are unavailable, sworn statements from witnesses may prove identity.[6] However, the Chamber noted that the best evidence rule implies that certain forms of evidence may be difficult if not impossible to obtain for reasons of elapsed time and/or the difficult circumstances of the country making other alternatives acceptable.[7]

With regard to child soldiers, the defence alleged weaknesses in the internal coherence of the children's declarations. The Chamber decided that sample files would be examined to determine the internal coherence of the children's evidence, including examining details regarding their recruitment, training and living conditions. In contested cases, the Chamber made reference to documentation from other sources in the case, such as requests for participation or previous requests for reparations.[8] Some inconsistencies are to be expected, and minor variations were not considered to be sufficient to render less credible the children's testimony.[9]

The criteria for child soldiers is that the child be less than 15 years of age at the time of conscription or enlistment under the Rome Statute of the ICC (the "Statute"), that the child have been in or conscripted by the armed units under Mr. Lubanga's authority, or have participated actively in the hostilities.[10] Once again, a degree of flexibility in supporting documentation is possible, including the

use unofficial documents and corroboration, subject to rules regarding probative value.[11]

Types of damages

Collective reparations in cases of mass crimes are more appropriate because the necessarily deal with a large number of victims, directly and indirectly affected, albeit to varying degrees.[12] In another ruling, a Pre-Trial Chamber found it appropriate to use a “presumption of collective injury” in cases where the applicants for reparations were not able to show a close relationship with the victim. The Chamber found that direct and indirect victims had suffered damages, and it identified specific types of injuries or harms giving rise to reparations.

With respect to *direct victims*, the Chamber relied on the earlier Appeal Chamber ruling to identify the following types of damages:

- physical trauma and violations of security of the person:
- psychological trauma and the development of psychological difficulties, notably suicidal tendencies and dissociative behaviours;
- interruption and termination of schooling;
- separation from family;
- exposure to an environment of violence and fear;
- difficulty in maintaining relations with family and community;
- difficulty in controlling aggressive impulses, and
- inability to adapt to normal life, placing the individual in a disadvantageous situation, especially with regard to the ability to find work.[13]

With respect to *indirect* victims, the Chamber further noted the following aspects:

- psychological suffering resulting from the sudden loss of a family member;
- material poverty resulting from the loss of revenues associated with a family member;
- losses and damages incurred by a person attempting to ensure that children do not suffer further damages as a result of the alleged crimes, and
- psychological suffering and material losses resulting from the aggression of former child soldiers who are reincorporated into their families and their communities.[14]

The Chamber noted that by reason of their age and vulnerabilities, child soldiers will be *presumed* to have experienced psychological, physical and material damages. This presumption is the result of conditions in the area and in the relevant forces or units such as: poor living conditions (including lack of access to potable water, inadequate shelter, lack of medical care, and increased likelihood of injury, rape and other forms of abuse); psychological trauma from having witnessed torture and from proximity to violence, munitions, and weapons, and the devastating consequences of all these factors afterwards, including dissociative states, depression, suicidal tendencies and the effects of alcohol and drug use.[15]

Causality

The Chamber adopted the common law “but/ for” test, *i.e.*, that “but for” the actions of the accused, the damages would not have occurred. The Chamber further referred to the standard requirement that the accused be the proximate cause of the damages suffered. As a result of the presumed damages experienced by child soldiers, the Chamber decided that the causal link between crimes and the damages suffered had been established through the operation of presumption.[16]

Collective reparations

The Chamber relied on the *Katanga* case for the proposition that in order to be considered eligible for reparations at the collective level, a group or category of persons must be connected through their identity or through a shared experience, as well as being the victim of the same violation or crime that falls within the jurisdiction of the Chamber. As a result, collective reparations can benefit an ethnic, racial, social political, or religious group that existed prior to the crime, as well as any other group that is united by harm and collective injury resulting from the crimes at issue.[17]

In addition, the reparations must benefit a group or category of persons who share characteristics or who experienced a shared harm. The 425 victims that were the product of the evaluation of the 473 filed were held to constitute such a group, in the sense that they experienced damage as a result of the crimes committed by Mr. Lubanga, even if they had not experienced the same specific injury or harm. In fact, the Trial Chamber II did not appear to find it necessary to specify a definitive number of victims (beyond the estimate of 3,000 initially provided by the Trust Fund for Victims) nor the specific harm that such victims may have suffered in a collective reparations case.

In this regard and relying on the principles established earlier in the *Katanga* case, the Court established, *ex æquo et bono*, the average or estimated damages suffered by each victim, as a result of material, psychological and physical harms, whether the victim was direct or indirect, in the amount of $8000.00 US each, for total of $3.4 m.

The balance of $6.6m was established, *ex æquo et bono*, for remaining victims as yet to be identified through the process of implementation of the reparations. Interestingly, this amount exceeded the figure requested by the victims’ lawyers, who had requested only $6m.

Conclusion

The *Lubanga* case is important from a reparations perspective for the size of the order (ten times higher than in the case of Congolese warlord *Germain Katanga*,[18] and almost three times higher than the cultural reparations ordered in the *Al Mahdi* matter.[19]) The case is important for the further development of principles used in reparations cases to identify eligible victims, for the specific standards and relevance of evidence needed to establish eligible victims who had been child soldiers, and for the principles to be used in assessing collective reparations. It remains to be seen whether the principles and standards used will be upheld on appeal.

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References

1. *The Prosecutor v. Thomas Lubanga Dyilo* No. ICC-01/04-01/06-3379-Red, December 15, 2017 (Trial Chamber II) online https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/06-3379-Red (“Lubanga”).
2. Various figures had been submitted by the parties and intervenors, with the defence arguing for a lower number of potential victims, and counsel for certain victims claiming much larger figures.
3. Marissa Brodney and Meritxell Regué, Formal, Functional, and Intermediate Approaches to Reparations Liability: Situating the ICC’s 15 December 2017 Lubanga Reparations Decision, EJIL Talk (Blog of the European Journal of International Law) January 4, 2018.
4. *The Prosecutor v. Germain Katanga:* No. ICC-01/04-01/07, 24 March 2017 (Trial Chamber II) Online <www.icc-cpi.int/CourtRecords/CR2017_05121.PDF> (“Katanga”).
5. Para. 40 *Lubanga*.
6. Paras. 70-74 *Lubanga.*
7. Para. 61 *Lubanga*.
8. Para. 63 *Lubanga.*
9. Para. 64, 86 *Lubanga*. See also *Katanga*, par. 70.
10. Under Article 8(e)(vii) of the Statute, three distinct crimes are engaged: the first two are the enrolment or conscription of children less than 15 years of age into armed forces or groups and the third is the use of children to participate actively in hostilities. A child may have been conscripted or enrolled prior to the period that is the subject of the crimes, but may still have participated in hostilities during the relevant period. Thus, the fact that a child was recruited before period related to the charges is not determinative of the status of the victim if it is demonstrated that the child participated actively as indicated. See also para. 93 *Lubanga.*
11. Paras. 86-87 *Lubanga.*

12. See the 2015 Order, citing *Kaing Guek Eav alias 'Duch'* ECCC 001/18-07-2007 26 July 2010 Doc. No. E188 (*Duch*Trial Judgment).
13. Para. 177 *Lubanga.*
14. Para. 177 *Lubanga.*
15. Paras. 180-181 *Lubanga.*
16. Both standards had been referenced by the Appeals Chamber in the 2015 Order at para. 82.
17. Paras. 193-194 *Lubanga.*
18. *Katanga, supra* note 4. See also Pearl Eliadis, "Reparations for Death and Destruction in the Congo" (2017) 1 PKI Global Just J 14.
19. James Hendry, "Reparations Principles in the Al Mahdi Appeal" (2018) 2 PKI Global Just J 10.